

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 037

Government Response
To Defense Motion To Depose
Yemeni President Ali Abdullah Saleh

6 February 2012

1. Timeliness.

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought.

The government respectfully requests that the Commission deny the Defense Motion to Depose Yemeni President Ali Abdullah Saleh ("President Saleh").

3. Overview.

As set forth more fully herein, President Saleh is a sitting head of state and is therefore immune from jurisdiction of any court of the United States, including this Commission, to compel his oral deposition. Thus, this Commission should deny the defense's request to compel an oral deposition of President Saleh.¹

4. Burden of proof.

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

¹ In this Response, because the issue of head-of-state immunity is dispositive of the matter, the prosecution does not express any views on the merits of the defense's motion. The prosecution reserves the right to do so in a subsequent pleading if necessary.

5. Facts.

Ali Abdullah Saleh is the President of the Republic of Yemen and the sitting head of state. According to news articles, President Saleh is currently in the United States at an undisclosed location seeking medical treatment. After the news reported his presence in the country, the defense on 31 January 2012 filed a motion to compel a deposition of President Saleh regarding four areas of questioning. Additionally, the defense filed a supplemental motion on 1 February 2012 requesting an expedited answer by the government and ruling by the military judge. On 3 February 2012, the government responded to the defense's supplemental motion for expedited review, asserting that the government would make every effort to answer the defense's motion in an expedited manner. On 06 February 2012, the Department of State provided the Chief Prosecutor a letter recognizing and allowing the immunity of President Saleh, as a sitting head of state, from the jurisdiction of this Commission to compel his deposition.

6. Law and Argument.

The Constitution assigns to the President alone the responsibility to represent the United States in its foreign relations. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“[T]he President alone has the power to speak or listen as a representative of the nation [in its dealings with foreign states].”). As an incident of that power, the executive branch has sole authority to determine whether a sitting head of state is immune from the jurisdiction of the courts of the United States. *See, e.g., Samantar v. Yousuf*, 130 S.Ct. 2278, 2291, 2292 (2010); *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (“[T]he decision concerning the immunity of foreign heads of states remains vested . . . with the Executive Branch.”).

In consideration of the relevant principles of customary international law, and in the implementation of the United States' foreign policy and in the conduct of its international relations, the executive branch has determined that Ali Abdullah Saleh, President of the Republic of Yemen, is presently immune from the jurisdiction of the Military Commission Trial Judiciary to compel his deposition. *See* Attachment B, Letter from Harold Hongju Koh, Legal Adviser, U.S. Department of State to Brigadier General Mark Martins, Chief Prosecutor, Office of Military Commissions (Feb. 6, 2012). As discussed below, the prosecution respectfully submits this determination is controlling and is not subject to judicial review.

The immunity of foreign states and foreign officials from the jurisdiction of our courts has different sources. For many years, such immunity was determined exclusively by the executive branch, and courts deferred completely to the executive's foreign sovereign immunity determinations. *See, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); *see Samantar v. Yousuf*, 130 S.Ct. 2278, 2284 (2010); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943). The Supreme Court made clear that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. This deferential judicial posture was not merely discretionary, but was rooted in the separation of powers. Under the Constitution, the executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; *see also Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the

constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.”).

In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act (“FSIA”). In FSIA, Congress transferred to the courts the responsibility for determining whether a foreign state is subject to suit. 28 U.S.C. §§ 1602 *et seq.*; *see id.* § 1602 (“Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). As the Supreme Court recently explained, however, Congress did not similarly codify standards governing the immunity of foreign officials. *See Samantar*, 130 S. Ct. at 2292 (“Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute’s origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the common-law practice of judicial deference to executive branch immunity determinations with respect to foreign officials. *See id.* at 2291 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”). Thus, the executive branch retains its historic authority to determine a foreign official’s immunity, including the immunity of foreign heads of state. *See id.* at 2284–85 & n.6 (noting the executive branch’s role in determining head of state immunity).

The doctrine of head of state immunity is well-established in customary international law. *See Satow’s Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity decisions are made by the Department of State, incident to the

executive branch's authority in the field of foreign affairs and informed by customary international law principles.

The Supreme Court has held that the courts of the United States are bound by the executive branch's determinations of foreign sovereign immunity. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the executive branch's immunity determination, declared that the executive branch's immunity decision “must be accepted by the courts as a conclusive determination by the political arm of the Government.” 318 U.S. at 589. After an immunity determination is filed, it is the “court's duty” to surrender jurisdiction. *Id.* at 588. The courts' deference to executive branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

For the same reason, courts have also routinely deferred to the executive branch's immunity determinations concerning sitting heads of state. *See Wei Ye*, 383 F.3d at 626 (“The obligation of the Judicial Branch is clear—a determination by the executive branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff.”); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (holding that the executive branch's determination of Prime Minister Thatcher's immunity was conclusive in dismissing a suit that alleged British complicity in U.S. air strikes against Libya), *aff'd in part and rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989). When the executive branch determines the immunity of a sitting head of state, judicial deference to that decision is predicated on compelling considerations arising out of the executive branch's authority to conduct foreign affairs under the Constitution. *See Wei Ye*, 383

F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the executive branch in these matters, the Seventh Circuit noted, is “motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved.” *Id.* See also *Spacil*, 489 F.2d at 619 (“Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation’s primary organ of international policy.” (citing *United States v. Lee*, 106 U.S. 196, 209 (1882)); *Ex parte Peru*, 318 U.S. at 588. The courts’ deference rests, in part, on the recognition that the executive branch possesses substantial institutional resources and extensive experience with which to conduct the country’s foreign affairs. See, e.g., *Spacil*, 489 F.2d at 619; *United States v. Truong Dinh Hung*, 629 F.2d 908, 913–14 (4th Cir. 1980). Furthermore, “in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves.” *Spacil*, 489 F.2d. at 619.

As courts have recognized, the executive branch’s head of state immunity determinations govern not only in civil litigation, but in criminal prosecutions as well. See *United States v. Noriega*, 117 F.3d 1206, 1211-12 (11th Cir. 1997); cf. *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20-21 (Feb. 14) (recognizing applicability under customary international law of head of state immunity principles in both civil and criminal context). Tellingly, no U.S. court has subjected a sitting head of state to its jurisdiction after the executive branch has determined the head of state’s immunity.²

² See *Habyarimana v. Kagame*, --- F. Supp. 2d ---, 2011 WL 5170243, *19 (W.D. Okla. Oct. 28, 2011) (“Where the United States’ executive branch has concluded that a foreign head of state is immune from suit, and where it has urged the Court to take recognition of that fact and to dismiss the suit pending against said head of state, the Court is bound to do so.”), *appeal docketed*, No. 11-6315 (10th Cir. Nov. 30, 2011); *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 278 (S.D. Tex. 2005) (“The executive’s [head of state immunity] determination is not subject to additional review by a federal court.”); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110 (D.D.C. 2005) (“When the executive branch concludes that a recognized leader of a foreign sovereign should be immune from the jurisdiction of American courts, that conclusion is determinative.”); *Leutwyler v. Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (holding that the executive branch’s

In consideration of the relevant principles of customary international law, and in the implementation of the United States' foreign policy and in the conduct of its international relations, the executive branch has determined that President Saleh is immune from the Military Commission Trial Judiciary's jurisdiction to compel the testimony of President Saleh in the instant matter.

7. Conclusion.

For the foregoing reasons, the government respectfully requests that this Commission deny the defense request to depose President Saleh. As President Saleh is a sitting head of state, he is immune from any compulsory process available to this Commission.

8. Oral Argument.

Due to the time-sensitive nature of this issue, the prosecution submits the matter should be decided on the pleadings, without presentation of oral argument to the Commission.

9. Witnesses and Evidence.

No witnesses or other evidence is anticipated at this time.

10. Additional Information.

The government has no additional information.

immunity determination on behalf of the Queen of Jordan "is entitled to conclusive deference from the courts"); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 297 (S.D.N.Y. 2001) (dismissing a suit against the President and Foreign Minister of Zimbabwe based upon an immunity determination filed by the executive branch), *aff'd on other grounds sub nom., Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1104, 1119 (D.D.C. 1996) ("The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive."); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (concluding that the determination by the executive branch of King Fahd's immunity as the head of state of Saudi Arabia required dismissal of a complaint against King Fahd for false imprisonment and abuse), *aff'd*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) (recognizing that the determination by the executive branch of Haitian President Aristide's immunity was binding on the court and required dismissal of the case); *Anonymous v. Anonymous*, 181 A.D.2d 629, 629-30 (N.Y. Sup. Ct. App. Div. 1992) (dismissing suit against unnamed head of state based on executive branch determination of immunity); *Kline v. Kaneko*, 535 N.Y.S. 2d 303 (N.Y. Sup. Ct. 1988) (dismissing suit based on "conclusive" determination of head of state immunity), *aff'd*, 546 N.Y.S. 2d 506 (N.Y. App. Div. 1989).

11. Attachments.

- A. Certificate of Service, dated 6 February 2012.
- B. Letter from Harold Hongju Koh, Legal Adviser, U.S. Department of State to Brigadier General Mark Martins, Chief Prosecutor, Office of Military Commissions (Feb. 6, 2012).

Respectfully submitted,

//s//

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CDR Andrea Lockhart, JAGC, USN
Justin T. Sher
Trial Counsel

Mark Martins
Chief Prosecutor

Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301

CERTIFICATE OF SERVICE

I certify that on the 6th day of February 2012, I filed **AE 037**, the **Government Response To Defense Motion To Depose Yemeni President Ali Abdullah Saleh** with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

/s/

Anthony W. Mattivi
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

February 6, 2012

Brigadier General Mark Martins
Chief Prosecutor, Office of Military Commissions
1610 Defense Pentagon
Washington, DC 20301

Re: *United States v. Al-Nashiri* (Military Commission Trial
Judiciary, Guantanamo Bay)

Dear General Martins:

The Defendant in the above-captioned case filed a motion on January 31, 2012 to depose His Excellency Ali Abdullah Saleh. President Saleh is currently the President and sitting head of state of the Republic of Yemen.

With regard to this motion, the Department of State recognizes and allows the immunity of President Saleh as a sitting head of state from the Military Commission Trial Judiciary's jurisdiction to compel an oral deposition of President Saleh in the pending case. Under common law principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law, President Saleh, as the sitting head of state of a foreign state, is immune while in office from the jurisdiction of the Military Commission to compel his oral deposition. Accordingly, the Department of State requests that you convey the Department's determination of President Saleh's immunity to the Military Commission at the earliest opportunity.

This letter recognizes the particular importance attached by the United States to avoiding compulsion of an oral deposition of President Saleh in view of international norms and the implications of the litigation for the Nation's foreign relations.

Sincerely,



Harold Hongju Koh
Legal Adviser